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Supreme Court of the United States

OCTOBER TERM, 1951

No. 411

YVETTE J. MADSEN,

Petitioner,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women,

Respondent.

PETITIONER'S REPLY BRIEF

JOSEPH S. ROBINSON,
745 Fifth Avenue,
New York 22, New York,

DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
454 Washington Building,
Washington 5, D. C.,

JOHN C. MORRISON,
1601 Kanawha Valley Building,
Charleston 22, West Virginia,

Counsel for Petitioner.

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On November 5, 1951 this Honorable Court granted certiorari and also granted Petitioner's application to proceed *in forma pauperis.*

The brief in support of the petition for certiorari, the petition for the writ of certiorari, and the supplemental brief fairly and completely state the facts and Petitioner's version of the applicable law. Because petitioner is proceeding *in forma pauperis,* it is respectfully requested that these documents be considered as her main brief.

The facts, with but few exceptions,[1] are undisputed and much of the legal argument of Petitioner is not controverted

[1] Respondent argues that military government, as such, did not terminate on September 21, 1949 (Resp. Brief Cert., pp. 27-28), the day on which the Occupation Statute went into effect. The Statement of Facts which was agreed upon between the Petitioner and Respondent specifically states that it did so terminate (R. 32). The official announcements of the State Department say that it terminated (R. 53-56). Honorable John J. McCloy, the United States High Commissioner in Germany, testified before Congress that it terminated (see Petition for Certiorari, pp. 3-4). There has been no "misapprehension" by Petitioner of the language employed in these documents or the actualities of the case, as Respondent con-

by Respondent. Respondent has, however, raised several legal questions and this reply is submitted in order to point out the fallacy and lack of merit of those arguments.

I. That Petitioner was "a person subject to military law" within the purview of Article of War 2 is no longer disputed. Nothing is said in Respondent's Brief on Certiorari to the effect that she was not such a person. The "grave doubts" on the subject expressed by the Court below (R. 120) are apparently not concurred in. The District Court ruled that Petitioner's classification as a person subject to military law was immaterial to the issues (R. 92). The Tribunal in Germany, in its *Ybarbo* decision, held that a dependent wife residing with her soldier husband in a war or occupied zone was a person subject to the Articles of War. Winthrop and the other leading authorities on military law cited in Point I of Petitioner's brief, all agree that Petitioner is so subject. The pleadings in this case likewise admit it (R. 4 and 17). The language of Article of War 2, particularly in the light of the 1916 amendment and the historical development of the Article, permits of no other interpretation.

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tends (Resp. Brief Cert., p. 27). Respondent is faced with a legal obstacle which she apparently is unable to meet. She therefore insists that military government was in force at the time of Petitioner's trial when, in fact, it did not. Winthrop, in his work on *Military Law and Precedents*, 2nd Ed., 1920 Reprint, at page 836 states:

> "A military commission (except where otherwise authorized by statute), can legally assume jurisdiction only of offences committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offence committed without such territory. (2) The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless specially empowered by statute), will have no jurisdiction of offences committed there." (See also Winthrop, supra, pp. 837-839 as to persons and offenses triable before military commissions.)

The question of the exclusiveness of court-martial jurisdiction over the persons enumerated in Article of War 2 and over the persons enumerated in the much larger group in the same Article in the new Uniform Code of Military Justice is one of the major issues for this Court's determination.

II. The jurisdiction of court-martial is exclusive. Respondent contends that by reason of Article of War 15 (now Article 21 of Uniform Code of Military Justice), military commissions have concurrent jurisdiction with courts-martial over all offenders and offenses, even over those which the Articles of War and the new Code specifically declare punishable by courts-martial. The fallacy of this contention is fully argued in Points II and III of Petitioner's Brief in support of certiorari. There are several statements, however, in Respondent's Brief in Opposition to Certiorari (Referred to herein as Resp. Brief Cert.) which tend to confuse the issue and which should not be permitted to remain unchallenged.

The early Articles of War contained no specific provision authorizing trial by courts-martial of any person (soldiers, officers, or others) for what is commonly known as the major offenses, i.e. murder, rape, burglary, etc. Such crimes were punishable by courts-martial only if they constituted conduct prejudicial to good order and military discipline or if such conduct affected the military service (Winthrop, *supra*, p. 667).[2] To punish offenses *not* specifically enumerated in the early Articles of War, the military

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[2] Winthrop states: "Prior to its enactment (Act of Congress, March 3, 1863, c. 75) courts martial were not invested, either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced 'good order and military discipline.' In 1863, however—during the late Civil War—the provision, incorporated in this Article, initiated in our military law the marked innovation of investing general courts martial with jurisdiction, in time of war, etc., of the graver civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service."

commission was employed (Dig. Op. JAG, 1912, pp. 1064-5, 1069-70; Winthrop, *supra*, p. 841). This is made clear by the unequivocal language of the earliest known document relating to military commissions, namely, General Order No. 20, dated February 19, 1847. It states: "* * * that no military commission shall try any case clearly cognizable by any court-martial * * *." Probably because of this historical background, offenses cognizable by courts-martial were commonly referred to as "military offenses." As Congress enlarged the categories of offenses punishable by courts-martial, they too became known as "military offenses." In Dig. Op. JAG, 1912 at p. 1065, "military offenses" are defined as "offenses which the Articles of War make cognizable by court-martial."

By the Act of 1863, the offense of murder became such a "military offense", since that Act, for the first time, made murder punishable by courts-martial regardless of whether or not the killing was considered as conduct prejudicial to good order and military discipline. In 1874, Congress enacted Article of War 58,[3] the predecessor of Articles of War 92 and 93 (now Articles 118-131 of the Uniform Code of Military Justice). The language of Article of War 58 was identical with the language employed in the Act of 1863 with only one material exception, i.e. the offenses enumerated in Article 58 were made punishable by courts-martial alone and the language in the Act of 1863 which authorized punishment by military commission was omitted (Winthrop, *supra*, p. 667).

Respondent admits (Resp. Brief Cert., p. 19) that Congress, by its enactment of Article of War 58 in the year

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[3] "Art. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or district in which such offence may have been committed."

1874, intended to invest courts-martial with exclusive jurisdiction as against military commissions, to try persons for murder, larceny, etc., but argues that such exclusive jurisdiction was only for persons "in the military service"; that persons in the category of Petitioner, a civilian, were not "in military service" and therefore not punishable by courts-martial for a violation of Article of War 58. In this respect Respondent errs (Article of War 60 of the 1806 articles, Article of War 63 of the 1874 articles, Winthrop, *supra,* pp. 98-99, Dig. Op. JAG 1912, pp. 151-152).

Under the 1874 Articles of War, the words "persons in the military service" used in Article 58 merely denominated a group of persons who were subject to the then Articles of War just as in the more recent Articles, the words "persons subject to military law" denominate a particular group of persons subject to those Articles of War (*In Re Yamashita,* 327 U. S. 1, 19). Mr. Chief Justice Stone, in delivering the opinion of the Court in the *Yamashita* case, made that quite clear. He said, at p. 19, that persons were so enumerated or denominated for the purpose of classification, and that the denomination included members of the Armed Forces and "the personnel accompanying the Army."

If, as Respondent contends, the words "persons in the military service" meant only the fighting personnel and not persons employed by, serving with, or accompanying the Army (*attaches*), how then does Respondent explain the basis for punishing such *attaches* by courts-martial for the various offenses enumerated in the Articles of War? Winthrop points out (pp. 98-100) that many such *attaches* were tried by courts-martial for the many offenses enumerated in the various Articles of War. Col. Winthrop said, at p. 98:

> "Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and com-

munication with the enemy, requires that these persons [retainers, attaches, those 'accompanying' etc.] shall be governed much as are those with whom they are commorant."

The group denominated as "persons in the military service" under the 1874 Articles of War and the group denominated as "persons subject to military law" under the 1920 Articles of War[4] included all *attaches*. Petitioner was a person within the denominated group and triable exclusively by courts-martial as against military commissions since 1874, when Congress denied such jurisdiction to military commissions.[5]

Had Congress intended to continue the military commission as a court of competent jurisdiction to try the offense of murder, it would have so declared just as it did in other Articles relative to other offenses (see Articles of War 80, 81, and 82 of the 1920 Code). Both under Article 58 of the 1874 Code and Articles 92 and 93 of the 1920 Code (now Articles 118-131 of the Uniform Code of Military Justice), persons in the category of Petitioner were triable by courts-martial for a violation of those Articles.[6] If the offense

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[4] This group is now referred to as "persons [are] subject to this Code" (Uniform Code of Military Justice, Art. 2).

[5] Congress intended and stated that only certain Articles of the 1874 Articles of War should apply exclusively to military persons, i.e., soldiers and officers. For example, Article of War 20 of the Articles of 1874 states that "any officer or soldier who misbehaves * * * shall be punished as a court martial may direct." Article 21 of the Articles of 1874 states "any officers or soldiers who * * * strikes * * * or offers any violence * * * or disobeys any lawful command * * * shall be punished as a court martial may direct." Articles 22, 23, 25, 26, and many others of the 1874 Enactment specifically refer to officers and soldiers; other Articles refer to soldiers alone, while still others refer to officers alone. Article 58 of the 1874 Articles of War contains no such limitation. The failure on the part of Congress to so limit Article 58 indicates an intent that said Article be applicable to all persons subject to the Articles of War, and not to soldiers and officers alone. The same is true of the 1920 Articles. Compare Articles of War 92 and 93 with Article 65.

[6] The limited provision of Article of War 58 (1874) making that Article applicable only "in time of war, insurrection or rebellion,"

were committed within the United States, civil courts and courts-martial had concurrent jurisdiction (*Caldwell* v. *Parker*, 252 U. S. 376).

Aside from the question of the exclusiveness of courts-martial jurisdiction to try Petitioner, the substantive law applicable should have been that of the Occupying Force and not the law of the area conquered. (*Coleman* v. *Tennessee*, 97 U. S. 509; *Hamilton* v. *McClaughry*, 136 F. 445, 448; and other authorities cited in Point II of Petitioner's Brief in Support of Certiorari.) Here, in addition to employing the wrong Tribunal, the substantive law of the conquered area was also wrongfully employed.

III. The Tribunal which tried Petitioner was not a duly constituted military commission, nor did it function as a military commission. Respondent does not contend that the Tribunal in question was created or constituted in accordance with the rules respecting the establishment of military commissions. Nor does Respondent contend that there was conformity with the law, as stated by this Honorable Court in *In Re Yamashita*, 327 U. S. 1, relative to the creation and procedure of military commissions.

Respondent claims that a judicial system was established which embodied basic procedural rights of American

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which General Crowder testified (Sen. Rep. 229, 63rd Cong., 2d Sess.) prevented the trial of two soldiers for murder committed by them after the Spanish American War, was stricken from the 1920 Articles. A provision was inserted in the Preamble which states that the Articles of War "shall at all times and in all places govern the Armies of the United States." Under the 1874 Articles, neither soldiers nor civilians could be tried, except in time of war, for a violation of the 58th Article. That defect in the Articles of War was cured by the language of the Preamble and Articles of War 92 and 93 of the 1920 Code, and not by Articles of War 12 and 15, as Respondent contends. Even assuming that there had been no changes in 1920 and that the 1874 Articles continued in effect to the present day, persons in the category of Petitioner, would be amenable to the courts martial jurisdiction in 1949 (the year Petitioner was tried) because a state of war did exist at that time, thereby satisfying the requirement of Article of War 58 (Winthrop, *supra*, pp. 666-671).

civilian law; that an appeals court was established; that this system is "more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts"; and that "only the clearest of commands in the Articles of War could preclude the President and his military commanders from taking such enlightened action" (Resp. Brief Cert., pp. 26-27). However Respondent may choose to characterize the action taken, she does not answer the basic contention of Petitioner that this is a nation of laws and that we are here confronted with the question whether the rule of law or the rule of military dictatorship (however benevolent it may be) is to be followed.

The law with respect to the establishment of military commissions and the procedure before such Tribunals, even though in part unwritten, is, like the common law, firmly established and any deviation therefrom is unauthorized (Winthrop, *supra*, pp. 831-846). Congress intended that the military commission shall be governed by the rule of law (see Articles of War 38, 47(c), 15, footnotes to 15, 23, 24, 25, 26, 115, and corresponding Articles in the Uniform Code of Military Justice). This Honorable Court, like Congress, has indicated that military commissions shall be governed by the rule of law (*In Re Yamashita, supra*).

In Article of War 47(c), Congress decreed that a certain procedure be followed before the finding of a military commission may be made effective, and that review be by a designated military officer.[7] Respondent, apparently, seeks to justify the failure to follow that procedure concerning Review with the statement that: "An appeals court of ci-

[7] "47(c) *Action on record of trial.*—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it."

INSERT, beginning page 9, third line of Petitioner's Reply Brief.

In addition, Article of War 47(c), implies that persons "subject to military law" may *not* be convicted by a military commission for any crime other than a violation of the Articles of War. Hence the language that no sentence of a military commission may be carried out unless guilt is established beyond a reasonable doubt "* * * of an offense made punishable by these articles, * * *" This clause does not apply to enemy aliens, as they do not fall within the provisions of the Articles of War (*In re Yamashita*, supra), but it does apply to Petitioner, who is so subject.

Respondent states that "* * * petitioner does not allege violation of any Article of War which is specifically applicable to military tribunals other than courts martial." (Resp. Brief p. 75) Petitioner refers to Articles of War 47(c), 38, and the other articles hereinabove mentioned as well as to articles 18 and 40 hereinafter mentioned. Reference to this matter is now made only because such issue was injected by Respondent (see page 18 ante).

In any democratic system for the trial of capital offenses, an accused is permitted unlimited challenges for cause and at least one or more pre-emptory challenges. Congress provided for such challenges in courts-martial proceeding (Article of War 18). Had Petitioner been tried before a courts-martial or had the Articles of War been made applicable to her trial—as they should have been, (assuming arguendo that she was properly tried before a military commission), she would have been permitted such challenges. Here Petitioner was required to stand trial before an appointed group of civilians (R. 66-67; Pet. Brief Cert. p. 5) with no challenges of any kind being permitted. Furthermore, the appointed group of civilians were authorized to act upon a majority vote, whereas Article of War 43 requires at least a three-quarter vote. Certainly, allowing a lesser vote injuriously affects the substantial rights of an accused (Dig. Op. JAG. 1912-40, p. 248). The right

of challenge, also, is an absolute right, denial of which affects "the substantial rights of the accused" and voids the proceeding (Dig. Op. JAG. 1912-40, p. 185, sub. div. 1; Manual for Courts Martial, 1949, p. 56).

The judges in these tribunals take an oath—but not an oath to uphold the Constitution and Laws of the United States (14 Fed. Register 127, Jan. 11, 1949), although they claim to act upon the authority of the United States with power to judge and punish citizens of the United States even to the extent of inflicting death. Why is the American flag in court rooms, wherein those who there act, claim to have the power, although they say it was not exercised, to trample under foot all the immutable rights and due process requirements for which the American flag stands?

Respondent argues at great length by a process of false legalism, that the words "law of war" as contained in Article of War 15 include any and all offenses and any and all offenders which under the old unwritten rules of warfare were punishable before tribunals appointed by the conquering or occupying force—military commissions since 1847 (Resp. Brief p. 26-52). Respondent states (Resp. Brief p. 40) that Petitioner is wrong in her assertion that those words refer only to offenses which offend against the law of war. Even the *Ybarbo* decision agreed with Petitioner's view and the writer of that opinion had to rely on some other admittedly untenable ground to sustain jurisdiction. This Honorable Court's interpretation of the words "law of war" in both the *Quirin* and *Yamashita* cases likewise accords with Petitioner's interpretation and not that of Respondent. It is to be noted that the Congressional Committee studying the proposed enactment of the Uniform Code of Military Justice was advised by the military officials that the words "law of war" mean exactly what Petitioner contends. Mr. Larkin answered "I believe a military commission may be defined as a tribunal which can be set up for the trial of persons who offend against the law of war * * *. You have an example in

that Sabateur case [the Quirin case]. That was a military commission." (Resp. Brief p. 61)

Murder committed by one member of an armed force against another member of the same armed force is not an offense against the Law of War. Article of War 15, therefore, has no applicability to the facts in this case, but even if it be assumed that it does have, the tribunal established in Germany which exercised alleged "concurrent jurisdiction" was of a type heretofore unheard of and did not conform to the rules of law applicable to such military commissions.

vilian judges was also established" (Resp Brief Cert., p. 26). But that is not what Congress directed.

Actually none of the rules respecting creation, composition, procedure, or review were followed and Respondent does not contend otherwise. As an excuse for not following the rule of law, Respondent says that the authorities cited by Petitioner are not law but are "at most suggestions and recommendations" (Resp. Brief Cert., p. 24) which do not have to be followed.

It is a novel theory, to say the least, to argue that acts of Congress and the law as laid down by this Honorable Court are merely "recommendations and suggestions" which may or may not be followed depending on the will of a commanding general or, as in this case, a subordinate State Department official. Absolute power and unlimited discretion, in effect, says Respondent, were vested in the military authorities in the American Zone of Occupied Germany and later in the State Department officials who were in control of the same area.[8] This proposition is wholly foreign to all basic concepts of constitutional government and unless we are willing to accept military dictatorship even to the limited extent espoused by Respond-

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[8] Mr. Justice Douglas, stating a general principle, with which no one would disagree, said in a dissenting Opinion (*United States* v. *Wunderlich*, decided November 26, 1951):

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

On the same day, in *State of New York* v. *United States*, Mr. Justice Douglas, in another dissenting Opinion, stating another undisputed general principle, said:

> "Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal."

ent, it should be rejected now, before this cancerous proposition has time to root.

IV. Persons subject to military law are not amenable to the laws of the area conquered or occupied by the Forces of the United States. Respondent reiterates what she argued before the District Court, namely that "even soldiers could be tried by military commissions for civilian crimes" (Footnote 12, Resp. Brief Cert., p. 20). Respondent argues in effect that the commanding general of an area or, in this instance a State Department official, may supersede the will of Congress as expressed in the Articles of War and may order the trial of American soldiers before tribunals of the character established in Germany, instead of by courts-martial, and for violations of local law instead of violations of the Articles of War.

This Honorable Court, in *Coleman* v. *Tennessee, supra,* and *Dow* v. *Johnson,* 100 U. S. 158, ruled that the personnel of our military forces are not amenable to the laws of the conquered area. Perhaps Respondent intends to imply that the rulings made in the *Coleman* and *Dow* cases were merely "suggestions" just as she claims that the rule of law laid down by this Honorable Court in *In Re Yamashita* was only a "suggestion" (Resp. Brief Cert., p. 24). The Appeals Tribunal in Germany, in its *Ybarbo* decision, characterized these rulings as "dictum".

Both the *Coleman* and *Dow* cases are glossed over by Respondent with the comment that they "hold only that the soldiers and officers of a conquering force were not subject to trial by the enemy" (Footnote 13, Resp. Brief Cert., p. 22). In terms too clear for misinterpretation, the rulings in those cases were that the local laws of a conquered area remain in force only for the inhabitants of the country occupied, and that the personnel of the occupation forces are not subject to the substantive law of the area so occupied.

Respondent cites, in addition to *Nealy* v. *Henkel,* 180 U. S. 109, and *Santiago* v. *Nogueras,* 214 U. S. 260 (neither

of which cases, as pointed out in Petitioner's Brief on Cert., pp. 50-51, has any applicability), the case of *Ex Parte Ortiz*, 100 F. 955. She cites it for the proposition that military commissions may be employed to try Americans, even those who are subject to the Articles of War, for offenses committed by them in an occupied area. The *Ortiz* case, although somewhat inconsistent in its reasoning with the *Santiago* case *supra*, nevertheless does *not* support Respondent's contention. That case involved the criminal trial of a Puerto Rican citizen before a military commission duly and properly appointed in Puerto Rico during the period of belligerent occupancy. In a *habeas corpus* proceeding, the United States District Judge said (p. 956): "* * * no objection in respect to the formal regularity of the proceedings is made or suggested." He then said (p. 957) that our Government and its agents do not have unlimited power to rule even a "subject people" because such rule is "the worst form of tyranny".

V. Unlimited power is not vested in the President, the military authorities, or in the State Department officials, to create tribunals for the trial of persons within the purview of Article of War 2 (now Article 2 of the Uniform Code of Military Justice). Respondent argues in substance that absolute and unlimited power is in the military authorities and State Department officials to establish tribunals in an occupied zone unhampered by the Constitution, the Acts of Congress, or the decisions of this Honorable Court. She argues further that any American citizen, whether that citizen be a soldier or a civilian, may be tried before tribunals so established, by procedure decreed by such authorities and for violation of either foreign law or for violation of any of their directives.

Nowhere in any branch of our National Government does there lurk a power so vast and unharnessed as is here claimed to exist. But, says the Respondent in substance, the system employed in Occupied Germany embodied basic procedural rights of American civilian law. We staffed

our courts, she says, with civilian judges experienced in civilian law and this "is more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts" (Resp. Brief Cert., p. 26). It is true, she continues, that many authorities, including the United States Supreme Court decisions, have held that we might have acted in a different manner, but these were only "suggestions and recommendations" which we chose not to follow (Resp. Brief Cert., p. 24). Petitioner's contention, says Respondent, that "she was entitled to be tried by a court composed of Army officers appointed by a military commander empowered to appoint general courts martial, and in accordance with the procedures specified in the Articles of War * * *, if sustained would be startling" (Resp. Brief Cert., p. 25). There are many thousands of American civilians in the Occupied Zone, Respondent says, and "As a substitute for the withdrawn jurisdiction of German criminal courts, a large number of these persons could have been subjected to the criminal jurisdiction of army court martials * * *" instead we established the system here under attack (Resp. Brief Cert., p. 26).

Startling, indeed, is this argument. Never before, counsel may venture to say, has it been claimed that Americans anywhere are outside the pale of the Constitution and Laws of the United States in a case involving trial by American authority. Respondent says that "enlightened action" was followed by the military and State Department officials in the creation of the court system in question (Resp. Brief Cert., p. 27). But what of the wicked ruler who may choose to follow less "enlightened action"? Apparently he too may act unhampered because, as Respondent argues, all the authorities respecting the establishment and procedure of military commissions "constitute at most suggestions and recommendations" (Resp. Brief Cert., p. 24) which do not have to be followed.

The mantle of "enlightened action" ill befits a judicial system which holds that neither the Constitution nor any

Statute of the United States applies to any trial before it whether the accused be an American civilian or an American soldier. Although Respondent says that basic procedural rights of American law were applied (Resp. Brief Cert., p. 26), General Joseph T. McNarney, Commanding General of the United States Forces in Europe, and his chief legal advisor, the Theatre Judge Advocate of the European Command, both of whom were on the scene and in a position to know, thought otherwise (see Footnote 3, p. 6, of Petition for Cert. and Footnote 28, p. 42, of Petitioner's Brief in Support of Cert.).[9]

[9] To deny protection against self-incrimination, to draw unfavorable inferences from silence, to admit hearsay evidence in a criminal proceeding, to deny effective representation by counsel and to try Americans under a judicial system which "lack[s] many of our recognized Constitutional guarantees and procedural safeguards," all of which General McNarney and his Theatre Judge Advocate pointed out in their communications to the War Department (JAGJ 1946/7691), is not the American way. To imprison Americans in enemy alien jails (see A. W. 16), to deny them the free choice of counsel, and to disregard elementary rules of evidence, all of which is pointed out in Petitioner's Supplemental Brief filed in Support of Certiorari, does not appear to be "enlightened action" nor action which accords with "our fundamental political ideals," despite Respondent's contention to the contrary.

Only recently the Appeals Tribunal in Germany, in Opinion No. 677 decided 15 August 1951, ruled that evidence illegally acquired is admissible even though a Military Directive (EUCOM SOP 96) and the Manual for Courts Martial, 1949, Par. 138 (Par. 152 of the 1951 Manual) direct the contrary. Recently, also, Counsel was advised that in the *Barshay* case (Petitioner's Supp: Brief on Cert., p. 2), the accused, being dissatisfied with a court-appointed lawyer, was held in contempt of court when he requested permission to act as his own counsel.

The judicial system in Germany likewise denies trial by jury or by a Board of Officers which is the substitute for a jury in the military system. One or three lawyers, depending upon the nature of the case, who interpret substantive law, which most of them cannot read as originally promulgated (since it is written in German), sit in judgment of an accused. They claim to have the power to inflict the death penalty or life imprisonment on American citizens even though none of the Constitutional or Statutory guarantees, they say, need be applied (see Petition in Support of Certiorari, p. 12). Counsel for the Petitioner do not agree that the system established

VI. The Constitution and laws of the United States apply to all trials of Americans conducted by American authority. In the lower Courts, Respondent contended without equivocation that Petitioner had *no* rights under the Constitution or any statute of the United States which would apply to her trial before the Tribunal before which she was tried (see p. 12 of Petition for Certiorari). While this contention is not repeated in so many words before this Court, Respondent, nevertheless, urges nothing to the contrary. Either this Petitioner and the thousands of other persons who are denominated as being within the purview of Article of War 2, are within the protective mantle of the Constitution and Laws of this country or they are subject to the worst form of military (in this case, State Department) dictatorship. The claim that such persons are subject to trial pursuant to "enlightened action" taken by the President and his military commanders (Resp. Brief Cert., p. 27) does not mitigate from the horror of dictatorship. Either the vast and seemingly unrestrained power wielded in this case exists, or it does not. The claimed good intentions with which it was exercised is of little consequence. The existence of the asserted power is one of the major questions which is presented upon this appeal.

The Fifth Amendment guarantee of due process of law applies to this Petitioner as well as all other Americans who are accused of crime by the Federal Government or any of its agents. Due process under our system of law does not allow for dictatorship regardless of how benevolent it is claimed to be. Due process does not recognize the judicial authority of any assembled body of men who act under American authority, be they called a military tribunal or an allied high commission court, to judge and imprison an American citizen, unless that body is assembled and com-

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in Germany accords with "our fundamental political ideals" or that it constitutes "enlightened action". It is a dictatorship which should be branded as unworthy of American tradition just as this Honorable Court branded the earlier case of military dictatorship which came before it in 1946 (*Duncan* v. *Kahanamoku*, 327 U. S. 304).

posed in accordance with law and unless it functions in accordance with law.

Respondent points to no part of the Constitution or Statutory laws of the United States which authorizes the establishment of the judicial system in question. She asserts merely that it flows from the war powers of the President and the unwritten common law of war, and that such war powers and law of war vests in the commanding general of a conquered area (or the State Department officials in that area), unlimited power to try and punish American citizens for violations of foreign law. Petitioner contends that no such dictatorial power exists in any branch of the United States Government and that to hold otherwise is to disregard the due process clause of the Constitution.

A similar question was before this Honorable Court in *Ex parte Milligan*, 71 U. S. 2. There the Court said, at p. 118, "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law."

VII. Respondent's Brief, which, except for its length, is substantially the same as the one submitted in opposition to certiorari, was received on January 3rd after Petitioner's Reply Brief had gone to press.

On page 4 the statement is made that by Military Government Proclamation No. 2, dated September 19, 1945, the German law of the area was continued in force. The fact is that this Proclamation was directed to the German people (R. 103) and intended for the German people only (JAGJ 1946/7691, 10 December 1946, par. 9; cf., *U. S. Mil. Govt.* v. *Collister*, Opinion No. 60, Reports, Mil. Govt. Courts for Germany). Counsel have been unable to find any decree or order making German law applicable to Americans.

Respondent states (p. 24) that "Mexican and Civil War military commissions tried over 2,000 cases, including the

cases of 100 women. Winthrop op. cit. pp. 834, 838." Col. Winthrop states that military commissions must have tried upwards of two thousand cases (nothing is said about the hundred women), but he points out that this was done pursuant to the Act of 1863 and General Order No. 20 of 1847 which authorized such trials during that period. Winthrop points out further, that the proceedings were legalized by the Act of March 2, 1867, c. 155 (p. 834) and that by the Act of 1874 the military commission was dropped as a court of competent jurisdiction to try the major offenses enumerated in Article of War 58 of the 1874 Code (Winthrop, *supra*, p. 667).

Respondent quotes at length (pp. 31-40 inclusive) from the testimony of General Crowder, given in 1916 before Congressional Committees in support of various amendments to the Articles of War. Material to the issues in this case is the following:

> "It [Article of War 15] just saves to these war courts *the jurisdiction they now have*, and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. *Both classes of courts have the same procedure.*" (Italics supplied.) (Sen. Bill S-3191, 64th Cong., 1st Sess., Rep. No. 130, Feb. 7, 1916. See also note 31, *In Re Yamashita*, 327 U. S. 1, 65.)

Respondent points (pp. 48-50) to Article of War 60 of the 1874 Code (prohibiting frauds against the United States) and states that the Attorney General has ruled that a civilian was not considered as being a person "in the military service" and therefore not punishable for a violation of Article of War 60. Winthrop, in that part of his treatise which relates to Article of War 60 of the 1874 Code, stated directly the contrary. He said (p. 698):

> "The Act, which was of a comprehensive character, provided not only for the trial of military and naval persons charged with the offenses specified in the first

section, but also for the prosecution both by *qui tam* action and criminal proceedings of 'civilians' similarly accused."

Winthrop, in his discussion of the 63rd Article of War (pp. 98-100), says that it denominated certain groups of civilians who were made amenable to all the provisions of the then existing Articles of War, excepting those Articles which by their very terms apply exclusively to officers and soldiers.

Respondent states (p. 51): "The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents, who bear no functional relationship to the occupying troops." Just what reasons of policy preclude soldiers of the occupying force from being subjected to trial before the courts here under attack and at the same time compel civilians, who are subject to military law, to be so subjected, are not made known. Apparently Respondent wishes to adhere to its former position that *power* to subject, even soldiers, to this type of tribunal exists (see Footnote 12, p. 20, Resp. Brief Cert.) but that presently the military commanders prefer not to exercise *such power*. If this Honorable Court accepts the proposition that *such power* exists, and that soldiers and civilians alike, may be subjected to trial before any forum the commanding general chooses to select and for violation of any law or military directive he may choose to apply, we have moved far along the road to military dictatorship. If this is the law, then practically no obstacle lies in the path of a would-be Caesar.

Respondent's argument (pp. 52-57 inclusive) that a civilian type tribunal, rather than courts martial, should be employed in an occupied area, should have been addressed to the law-makers and not the judiciary. Congress has decreed the manner in which, all persons within the pur-

view of Article of War 2, shall be tried. It has declared the substantive law applicable to such trials, as well as the rules of procedure and review. Nowhere has Congress provided for so-called civilian type tribunals, nor did Congress act unwisely in not authorizing such courts. While Respondent speaks with praise of the system established, many highly experienced American lawyers, who have appeared before those tribunals, speak otherwise.

If, as Respondent contends (p. 54), a judicial system, wholly free of the basic and statutory laws of the mother country and subject exclusively to the will of one man, was employed to teach democracy to Germans, counsel fear the Germans have been taught the wrong type of democracy.

Lengthy references are made to what the British have done in their zone. Counsel do not here intend to discuss British law. Suffice it to say that from what appears in Respondent's Brief, the British have inaugurated a system whereby the accused may at least be tried by a jury of his peers. Furthermore, under the system set up in the British Zone, only persons "not otherwise subject to military law" (Resp. Brief, p. 54) are amenable to trial before those courts.

Respondent argues (p. 56) that Petitioner does not contend that she was deprived of "any element of due process of law." Apparently Respondent misinterprets the entire basis of this appeal. Petitioner contends that she was not tried according to law by a tribunal established by law, and that she was not permitted appeal in accordance with law. Furthermore, she contends that she was tried for a violation of substantive law to which she was not subject. All the elements of due process, which were denied her in the course of the proceedings and which appear in her record of trial, have been *designedly* omitted so as not to confuse the basic issues. Either the commanding general (in this case, a State Department official) had the right to make his own laws for her trial, or he did not have such right. If, as Petitioner contends, he did not have, then

every step taken with respect to her trial constituted a denial of due process.

Respondent makes the argument and quotes at length from Congressional hearings (pp. 58-66) to show that Congress, with knowledge of the system employed in Germany, re-enacted Article of War 15. Congress was expressly told (Resp. Brief, p. 63) that the tribunals in Germany were established for the trial of "civilians who are *not* subject to the Code (Uniform Code of Military Justice)." By merely re-enacting the statute, Congress did not thereby place its stamp of approval on what was done in Germany, nor did Congress thereby intend to permit any improper application of the statute. In any event, Congress is without power to take from this Honorable Court the duty and responsibility of judicially determining the validity and Constitutionality of the acts complained of in this case.

Respondent states at length (pp. 66-75) her reasons for justifying the existence of this heretofore unheard of type of military tribunal. A new and novel theory is advanced, namely, that only in the case of the trial of a soldier, must the military commission be established by competent military authority (pp. 67-68). Of course no authority is cited for this proposition. In any event the ruling of this Honorable Court in *In re Yamashita, supra,* is directly to the contrary. Respondent refers to *Handlin* v. *Wickliffe,* 12 Wall. 173, where it would appear that a civilian, in the capacity of military governor, appointed a military commission, and she draws the conclusion that Mr. McCloy, a State Department official, was likewise so empowered. There is a substantial difference between a civilian who acts as military governor of an area, and a civilian whose functions are limited to merely supervising the activities of the restored German Government (see pp. 3-5 of Petition for Cert.). Nowhere is it claimed that Mr. McCloy was acting as military governor at the time Petitioner was brought to trial. Respondent would like such inference to

be drawn (pp. 67-68), but on the facts in this case it cannot be drawn.

Respondent seeks to justify the application of the German Criminal Code to the trial of Petitioner, a person subject to military law, with the statement that it was appropriate, because Germans and other United Nations nationals were more familiar with the continental code (p. 70) and that by applying German law to everybody, including Petitioner, a uniform system was put into operation. It is difficult to understand the theory of international law, advanced by Respondent, that the citizens of a victorious and conquering nation should be treated in the same manner as the enemy inhabitants who were recently subjugated by force. The law is to the contrary (*Coleman* v. *Tennessee, supra*).

Respondent stipulated (R. 27-28) that Petitioner herein enjoyed all the privileges and immunities of persons in the Armed Forces of the United States and that she enjoyed all the immunities from German jurisdiction granted persons in the Armed Forces of the United States. If, as Respondent now contends, Petitioner was nevertheless amenable to German Law, then other persons, including the soldiers and officers of our occupying forces, were equally amenable to German Law. Officers, soldiers and others accompanying the Army must therefore familiarize themselves with the laws of the various countries through which they move in order to be free of punishment for a violation thereof. Such is not now and never has been the rule of international law (see authorities cited in Pet. Brief in Support of Cert., pp. 31-35).

Lastly, Respondent says Petitioner does not claim that the procedure at her Trial was less fair than that of court-martial, but merely that it was different. Petitioner claims that neither the creation or composition of the court, nor the procedure upon trial or review, was according to law, and that the question of the fairness or unfairness of the action taken does not raise a legal question. The fact is that Petitioner was singled out for trial before this

particular tribunal. Counsel has personally acted as attorney for a number of civilians who were within the purview of Article of War 2, on their trials before courts-martial in Germany. In fact, hundreds of civilians, who fell within the purview of Article of War 2, have been tried by courts-martial during the period in question. The "startling" results which Respondent claims (Resp. Brief Cert., p. 25) would follow from the trial of civilians before court-martial goes for naught in the light of what actually has happened. There is nothing startling or unusual about courts-martial trials.

Special courts-martial (trials involving lesser offenses) have been known to dispose of as many as twenty cases and more in a day with all the safeguards authorized by law fully protected. Trials before general courts-martial have consumed longer periods of time depending upon the case. Courts-martial are fully capable of handling all business which may come before it with dispatch and with all the protection which the Constitution and Laws of the United States afford to an accused. There was, in fact, no need to resort to the system established in Germany for the trial of Americans, Respondent's unsupported statements to the contrary, notwithstanding.

VIII. *Conclusion.* The judgment of the Court below should be reversed and the writ of *habeas corpus* heretofore issued should be sustained.

Respectfully submitted,

JOSEPH S. ROBINSON,
DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
JOHN C. MORRISON,
Counsel for Petitioner.